

1 MR. McGOWAN: Columbia, Maryland.

2 THE COURT: That is where their operating
3 facilities are?

4 MR. McGOWAN: The headquarters. They have
5 operating facilities, Curtis Bay and Lake Charles,
6 Louisiana. Curtis Bay is in Maryland.

7 THE COURT: What about Davison?

8 MR. McGOWAN: That is Davison I was
9 speaking to, Your Honor.

10 THE COURT: What about Performance?

11 MR. McGOWAN: Performance Chemical, that
12 has headquarters in Cambridge, Massachusetts, and they
13 have about 30 plants throughout the United States in
14 Chicago and almost in every state they have a plant.

15 THE COURT: Okay. Go ahead.

16 MR. BERNICK: Asbestos. Grace has not been
17 a first-tier player in the asbestos litigation for the
18 relatively simple reason that it only entered asbestos in
19 business in 1963. They acquired a business called
20 Zonolite. Even with that acquisition, there were a
21 relatively limited number of products that contained
22 added asbestos. That history, that is, that they are not
23 a first-tier or mainstream player in the asbestos
24 business is reflected, as you see, in the history of



1 claims. If you take a look at the first chart.

2 THE COURT: They don't make it anymore, do
3 they? They don't make products that contain it anymore.

4 MR. BERNICK: As I understand it, from
5 1963, essentially with the acquisition of Zonolite until
6 1973, they made products that contained added asbestos.
7 Principally it was a form of spray-on insulation that
8 went on wet for large high-rise structures. There was
9 additional product that was made out of vermiculite.
10 Vermiculite is mined. It's not actually asbestos, but,
11 as it is mined, it contains asbestos as a contaminant.
12 So it would be mined. They would have some claim in
13 connection with the mining process but then it will be
14 refined. By the time it reached the ultimate consumer,
15 from a regulatory, definitional point of view, it is not
16 an asbestos-containing product. Chemically it contains
17 very, very small trace elements of asbestos.

18 So you are talking about basically a
19 ten-year window of time and relatively limited number of
20 products, and that created the basis for the overwhelming
21 number of claims that have been brought. They faced
22 property damage claims, claims seeking remediation of
23 asbestos in place. They faced bodily injury claims.
24 Most recently they faced claims relating to attic fill.



1 THE COURT: What fill?

2 MR. BERNICK: Attic fill. Attic as in
3 attic of a home.

4 THE COURT: Attic fill.

5 MR. BERNICK: Because it's a vermiculite
6 product that is loose and poured into the attic rafters
7 as insulator.

8 If you take a look at the first chart what
9 shows is that the first year actually is 1982. 1982 was
10 the year that Manville went into Chapter 11. As you can
11 see, by 1982, Manville, which was a mainstream player,
12 already had a very substantial asbestos problem. But
13 there were almost no claims -- I think there were fewer
14 than 100 claims that are pending against Grace as of that
15 point in time. As the 1980s evolved, the level of the
16 claims grew. Obviously, it became of concern but it was
17 still a relatively limited population of claims.

18 Once you got into the early 1990s, you have
19 a substantial increase in the volume of claims. And it
20 is, as you'll see for the first half of the 1990s, the
21 approach that Grace took to that process was to be a
22 pretty aggressive litigator of claims. As our
23 informational brief sets out, nobody can litigate
24 consistently asbestos liability claims under the --



1 THE COURT: I was going to read that, but I
2 only had about a half hour. It was 91 pages long. So it
3 made it a little tough for me to try to comb my way
4 through it

5 MR. BERNICK: It was not designed to be
6 consumed during that period of time. We very much urge
7 the Court to take a look at it. It's long, but it covers
8 a lot of different areas. We hope it's relatively
9 succinct. The back end talks about what it is we hope to
10 do with this case.

11 In the early part of the 1990s, the
12 approach the company took was to continue the litigation
13 process. It had to settle, but it also sought to
14 litigate. It's relatively successful. Won 44 of 63
15 trials, obtained a dismissal of 35,000 -- close to 35,700
16 claims.

17 The back end of the 1990s, the company took
18 a different approach. It was not that they felt they
19 didn't have liability defenses, but it just became
20 infeasible to continue the litigation process. Very
21 expensive to litigate on a case-by-case basis, very
22 difficult to have witnesses who can go from court to
23 court to engage in the necessary process of telling the
24 company's story. And therefore, in the back end of the



1 1990s, the company had no choice but basically to enter
2 into what it called inventory settlements. These are
3 basically, undertakings, procedures that are adopted with
4 respect to different law firms, different plaintiffs'
5 firms whereby a huge volume of claims are settled on
6 something like similar terms over time.

7 That had certain advantages. It kept a
8 consistency and control, enabled the company to save
9 transactional costs, but it came with a very substantial
10 price. And the criteria for the payment of the claims
11 got further watered down. We'll be educating the Court
12 in this regard. But the criteria for what constitutes
13 the minimum medical condition was no longer the same
14 criteria that doctors used to diagnose.

15 THE COURT: If it helps you any, in my
16 former life which is now quite a while ago, I once was
17 involved in the representation of an insurance company on
18 insurance coverage claims involving lots of asbestos
19 companies, and I have personally reviewed a lot of
20 asbestos claims. So I know a little bit about this.
21 Mesothelioma to asbestosis and so forth and so on.

22 MR. BERNICK: That's fine.

23 During this period of time -- and I don't
24 know when Your Honor would have been involved, but by the



1 back end of the 1990s, we are now talking about claims
2 being processed that, to our viewpoint, what would be
3 what we will be submitting in this Court no longer meet
4 any medical criteria sufficient to diagnose disease. I
5 don't know to what extent that was a problem or an issue
6 then.

7 THE COURT: I have to say, you're probably
8 addressing most of this to the wrong guy because I'm not
9 going to be hearing any of it. The fact is that the
10 District Court is the only one that has jurisdiction, I
11 think, to hear these kinds of personal injury and tort
12 kinds of claims.

13 MR. BERNICK: That's fine. And obviously
14 this is what animates our motion to withdraw reference
15 and our plans for litigating in District Court.

16 The long and short of it is, by the end of
17 the 1990s, the trend was coming down and claims, as you
18 see from the first chart -- and the based upon our
19 actuarial analysis, we believed that both the claims
20 history and underlying epidemiology which drives the
21 actuarial analysis says the trend is downward and we are
22 at the back end of the problem. The company was
23 encouraged by that, disappointed obviously that the
24 problem had gotten to where it was, but encouraged by the



1 downward trend.

2 Why are we here? Why we are here is the
3 second chart. Essentially what's happened in the last 18
4 months, you see very dramatic --

5 THE COURT: You know, there aren't any
6 numbers on these charts, so I don't know what you mean
7 when you say the second chart.

8 MR. BERNICK: The second chart is the one
9 that's got the red bar.

10 THE COURT: Thank you.

11 MR. BERNICK: As you see, the claims in
12 1999 rose somewhat, but they were not dramatically out of
13 line. In the year 2000, you can see that there is
14 literally almost a doubling, not quite but almost a
15 doubling in 12 months of the entire filing rate in 1999.
16 And obviously, the company feels that there's no basis,
17 either in the history of sale of its products or its
18 science, for the claims focus all of a sudden shifting to
19 and targeting Grace in this fashion. But whatever the
20 motivation was, the fact of the matter is that this
21 dramatic increase, this spike essentially, rendered the
22 process of dealing with these claims unmanageable, and
23 not only unmanageable by the company, but started to
24 impair financing. And it's really this spike, this



1 dramatic development which has not been mitigated this
2 year -- the early returns this year are no better than
3 they were last year. It left us with no choice but to
4 file the case.

5 And the essence was, what we are trying to
6 accomplish in the case, is to kind of go back and say,
7 now that we are in 11, what are the valid claims that
8 there are against this company so that we don't depend
9 upon what essentially is a privatized system to tell us
10 what our liability and what our payments are, that we
11 have a rationalized basis that has a grounding in science
12 and has a grounding in law that says, here's what the
13 liability is that should be paid and no more so that we
14 can then provide for the funding of that liability. And
15 that's why, day 1, in order to get the process underway,
16 we've moved to withdraw the reference and we are seeking
17 to embark upon that process in the District Court.

18 The same type of approach is presently
19 underway in the Babcock and Wilcox case which is pending
20 in New Orleans. The reference there has been withdrawn.
21 A bar date has been set. Claims forms, special claims
22 form have been developed. And we are moving down the
23 road later on this year to start to litigate in District
24 Court over what the scope of that company's liability is.



1 That is a different kind of case in some
2 ways, but we are proposing a procedure that is similar in
3 many respects to that process. We believe that these two
4 companies, that is, Babcock and Wilcox and Grace will not
5 be the last to go down this road. We think that we know
6 at least one other company we believe is moving down the
7 same road as well.

8 So that is essentially why we are here. I
9 apologize for the length of the informational brief, but
10 we hope it will be a reference at some point that will be
11 useful to the Court to be very clear about where it is we
12 are heading with the case and why.

13 THE COURT: All right. Is there anything
14 further at this point?

15 MR. SPRAYREGEN: Your Honor, we have the
16 essential trade issue and the final -- I'm sorry --
17 interim DIP financing, and I'm prepared to hand up
18 proposed orders on both, if I may approach.

19 THE COURT: Marked up TRO?

20 MR. SPRAYREGEN: Your Honor, that is being
21 marked as we speak, I believe.

22 Your Honor, what we did with the essential
23 trade is, did accept the Court's suggestion on the pay
24 all of the trade, the \$34.3 million, I believe it was.



1 And with respect to the DIP, we added in the
2 million-dollar paragraph for carve-out for the Trustee
3 plus the excess of 7 1/2.

4 THE COURT: All right. Very good.

5 MR. SPRAYREGEN: Your Honor, while we are
6 looking, might we get the TRO order back? You have the
7 original that we needed to mark up. Thank you.

8 THE COURT: Okay.

9 MR. BACON: Your Honor, before I get caught
10 up in the litigation, I would like to confirm in one
11 minute something very important to us relative to the
12 interim financing order that you may have just signed or
13 are about to sign.

14 THE COURT: I did sign it.

15 MR. BACON: That order -- and this is an
16 agreement I have with the debtor. Again, Doug Bacon for
17 Bank of America.

18 That order and the underlying credit
19 agreement both contemplate a final order which is a
20 defined term in their provisions to that final order that
21 we took out in order to facilitate the interim order that
22 are more appropriate for final order. The order Your
23 Honor signed with our support may become a final order,
24 but the agreement between the agent Bank of America and



1 the debtor is that, notwithstanding that it may become a
2 final order, it is not the final order for purposes of
3 the credit agreement unless the agent agrees in its sole
4 discretion. In other words, Your Honor --

5 THE COURT: We are not dealing with final
6 orders today. That's why they call them an interim
7 order. So you don't have a problem.

8 MR. BACON: Yes, Your Honor, but the order
9 does say it may become.

10 THE COURT: It may, but it is not.

11 MR. BACON: I just would like the debtor to
12 confirm we have that understanding as well.

13 THE COURT: Even if they don't have, I do.
14 So that's that.

15 MR. BACON: Thank you, Your Honor.

16 MR. BERNICK: Your Honor, to return to the
17 TRO, first a matter of information. I've just been told
18 that a new fraudulent transfer action has been filed in
19 Massachusetts today in federal district court. So
20 obviously the problem continues.

21 MS. DAVIS: Your Honor, I don't think we
22 are responsible for that one.

23 THE COURT: Are you -- I guess I missed it.
24 Are you responsible for the one in California?



1 MS. DAVIS: We may be, or a group that we
2 are associated with.

3 THE COURT: I see.

4 MR. BERNICK: I'm trying to get to the
5 point of making a proposal to the Court that people can
6 live with and that gives us protection. The existing
7 Sealed Air and Fresenius cases are in the process, we
8 hope, of being removed and transferred out here. So,
9 since that ought to take care of, we hope, that
10 particular piece of litigation. Particularly because of
11 this new piece of information, though, we would ask the
12 Court to include this type of claim, that is, a
13 fraudulent conveyance claim in the order. And what we
14 are proposing -- and I pencilled it in here on the
15 definition of actions -- is that actions under the order
16 which are the ones that would be enjoined include as C
17 any action other than the existing actions against Sealed
18 Air and/or Fresenius, comma, alleging fraudulent transfer
19 and fraudulent conveyance claims which would have the
20 effect of saying that, with respect to the cases that are
21 being transferred -- I guess also now existing would
22 include Massachusetts, would it not? If we want to sweep
23 in Massachusetts, we have to say, existing actions
24 against Sealed Air and Fresenius in California.



1 THE COURT: I'm just not going to do it.
2 I'm not going to do it today. I'm not going to say I'll
3 never do it, but I'm not going to do it today. You need
4 to show me more, and I don't know that I have a clear
5 enough understanding. I certainly understand the
6 individual asbestos claim. I'm not sure I have a clear
7 enough understanding of all the particulars as to the
8 fraudulent transfer claims, and I'm not going to do it.

9 MR. BERNICK: To just to help us out, Your
10 Honor, is there something in particular that we should
11 focus on?

12 THE COURT: I don't know. I don't know
13 what you should focus on because I don't know enough
14 about it. That's part of the reason why I'm not doing
15 it. That's the whole reason why I'm not doing it.

16 MR. BERNICK: Okay. I understand, Your
17 Honor.

18 THE COURT: I don't know that you've shown
19 irreparable harm. I don't even know what it would be
20 harm about at this point, so I'm not doing it.

21 MR. BERNICK: Why don't you give us a
22 minute and we'll further amend this order.

23 MR. BAKER: Your Honor, with some
24 trepidation I have to ask. Would it be of any assistance



1 to the Court to hear any specific information on behalf
2 of either Sealed Air or Fresenius?

3 THE COURT: Well, here's my problem. I
4 don't think even that I got the TRO and the brief until
5 it was presented, it was walked up to the bench today.
6 And I've already signed about 40 more orders based on
7 total lack of information today than I've ever signed in
8 18 years. I'm not about to issue a TRO based upon what
9 I've heard or what I have in front of me. I mean, I've
10 got a brief here that must be 40 pages long alone. And
11 I'm just not prepared to do it today. Maybe if you came
12 back tomorrow, I might do it if I add a chance to read
13 it, but I'm not going to it today.

14 MR. BAKER: Okay. We understand, Your
15 Honor.

16 THE COURT: Don't even ask. I'm serious.
17 Don't even bring it up again. I'm done. I'm not -- this
18 is not negotiable. No matter how many times you say it,
19 the answer is still going to be no.

20 Do you have an order that I can sign?

21 MR. BERNICK: Yes. That was what I wanted
22 to do.

23 THE COURT: Thank you.

24 MR. BERNICK: In terms of hearing date for



1 preliminary injunction motion --

2 THE COURT: We'll deal with that at some
3 point, but I'm not going to deal with it today because I
4 don't have a calendar with me and I don't know when I can
5 do that. But I can tell you this, I will extend the TRO
6 for the maximum period. So that gives us at least 20
7 days after that. You may up having to come out to
8 California. I don't know because I don't know that I can
9 hold a preliminary injunction hearing over the phone.

10 MR. BERNICK: This is just a simple
11 solution, Your Honor. We've stricken out the entire
12 sentence that relates to Fresenius and Sealed Air
13 matters.

14 THE COURT: We'll have to fill in the blank
15 later.

16 Now, do we have anything else that you want
17 to bring up because I've got one thing that I want to
18 bring up, or two.

19 MS. JONES: In terms of if there should be
20 a need for a final DIP hearing or if there should be
21 objections to the motions that we started off the hearing
22 with that were put on negative notice, what would be the
23 best procedure for us to obtain a date from the Court
24 whether it was for telephonic hearing or what have you?



1 THE COURT: You need to call my courtroom
2 deputy in California. The number is as follows:
3 879-3533. That's 510 area code. And then we'll
4 coordinate with the courtroom deputy here.

5 MS. JONES: Thank you.

6 THE COURT: Anything else?

7 MS. JONES: No, Your Honor. Thank you for
8 your time.

9 THE COURT: Well, I've got a couple of
10 matters that I want to raise. The first one has to do
11 with a case management order. If you look at the
12 Northern District of California web site and you look
13 under large cases on that web site and you click on Crown
14 Vantage which is a paper company, you will find a case
15 management order that I would propose might be used in
16 this case. I think case management orders make a lot of
17 sense. They set specific procedures that prevent me from
18 having 91-page briefs, for one thing, because the page
19 limits were 15 in Crown Vantage. They do lots of other
20 things that make it much easier for the Court to actually
21 make an informed decision about what's going on also
22 gives notice appropriately to other parties.

23 The second issue that I want to raise is
24 probably a fitting way to end the hearing because I've



1 heard and I've looked at enough of the 20 largest
2 creditors and some of the other materials to raise this
3 issue, even though this is my first day in town. And
4 that is question of venue. This is a Columbia, Maryland,
5 case that has two New York creditors that hold
6 \$500 million in debt. There are trade creditors, I
7 understand it, among the 20 largest, many of which come
8 from Chicago. The one thing I don't see is why this case
9 was filed in Delaware.

10 So what I'm going to do -- and I guess this
11 is something totally new here in Delaware -- is I'm
12 hereby issuing an order to show cause why this case
13 should not be transferred pursuant to Section 1412. And
14 I'm doing it on my own motion. You have five business
15 days to tell me why I shouldn't do it.

16 Now, nothing that I've worked on this
17 afternoon is going to go unfinished. In other words, I'm
18 not going to transfer the case until I've gotten
19 everything in place pursuant to the first day orders, the
20 20 days for the cash collateral, and TRO, and so forth.
21 I'm not going to transfer the case willy-nilly, if I
22 transfer it at all, which is why I've talked about the
23 case management procedure, why I've talked about hiring a
24 special deputy. But I think the issue is an appropriate



1 one to raise, and no one has raised it as of yet, but
2 this is the appropriate time to do so at the beginning of
3 case. And so I just have.

4 Now, does anybody have any questions?

5 You should submit the briefs to 1300 Clay
6 Street, Room 220, Oakland, California, 94602, and I will
7 decide this matter on those papers. I will have a
8 decision for you by the end of next week. Nothing, as
9 I've said, should be construed as in any way jeopardizing
10 anything that's happened here today. I'm not going to
11 leave this case in the lurch. I'm not going to leave the
12 financing in the lurch or anything else. But I'm going
13 to go forward with this.

14 The U.S. Trustee obviously is welcome to
15 participate.

16 Anything further?

17 We will stand adjourned.

18 (Which was all the proceedings had on
19 hearing of said cause on the date aforesaid.)

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C E R T I F I C A T E

I, Ann M. Calligan, Registered Merit Reporter and Notary Public, do hereby certify that the foregoing record, pages 1 to 123, inclusive, is a true and accurate transcript of my stenographic notes taken on April 2, 2001, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of April, 2001, at Wilmington.



Ann M. Calligan



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CASE NAME: W.R. Grace & Co.

CASE NO.: 01-1139

COURTROOM NO.:

2A

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James Sprayregen	Kirkland & Ellis	Debtors
STEVE YODER	The Bayard Firm	Bank of America
Douglas Bacon	Cathran & Watkins	Bank of America
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